

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Committee Substitute

for

Senate Bill 348

[Originating in the Committee on Health and Human
Resources; reported on February 10, 2019]

1 A BILL to repeal §16-9A-3 of the Code of West Virginia, 1931, as amended; to amend and reenact
2 §16-9A-1, §16-9A-2, §16-9A-7, and §16-9A-8, all relating to tobacco usage restrictions;
3 legislative findings and intent; raising the legal age from 18 years of age to 21 years for
4 the selling, furnishing or distribution of tobacco products; adding definitions; and
5 increasing penalties for violations.

Be it enacted by the Legislature of West Virginia:

ARTICLE 9A. TOBACCO USAGE RESTRICTIONS.

§16-9A-1. Legislative findings and intent.

1 (a) Findings --Tobacco is the leading cause of preventable death in America: It causes
2 over 480,000 deaths annually and has been responsible for 20.8 million premature deaths in the
3 U.S. over the past 50 years since the first Surgeon General's report on smoking in 1964. The
4 Legislature recognizes that young people are particularly susceptible to the addictive properties
5 of tobacco products, and are particularly likely to become lifelong users. An estimated 5.6 million
6 youth are projected to die prematurely from a tobacco-related disease if smoking prevalence rates
7 do not change. National data shows that about 95 percent of adult smokers begin smoking before
8 they turn 21. The ages of 18 to 21 are a critical period when many smokers move from
9 experimenting with smoking to regular, daily use. Young minds are particularly susceptible to the
10 addictive properties of nicotine. Tobacco industry documents show that an 18 year old that has
11 never smoked has a three-to-one chance that he or she never will. However, a 21 year old who
12 has never smoked has a 20-to-one chance that she or he never will. E-cigarettes are the most
13 commonly used tobacco product among youth increasing by 78 percent from 2017 to 2018 among
14 high school students, leading the U.S. Surgeon General to declare youth e-cigarette use an
15 epidemic. In 2015, 8.6 percent of high school students were current cigar smokers; 11.5 percent
16 of boys and 5.6 percent of girls. High school boys smoke cigars at a higher rate than cigarettes.
17 In 2015, the National Academy of Medicine concluded that raising the minimum legal sales age
18 for tobacco products nationwide will reduce tobacco initiation, particularly among adolescents

19 aged 15 to 17, improve health across the lifespan, and save lives. The National Academy of
20 Medicine also predicts that raising the minimum legal sales age for tobacco products nationwide
21 to 21 would result in 223,000 fewer premature deaths; 50,000 fewer deaths from lung cancer, and
22 4.3 million fewer years of life lost for those born between 2000 and 2019. Three-quarters of adults
23 favor raising the minimum legal sales age for tobacco products to 21, including seven in 10 adult
24 smokers. Raising the minimum age to purchase tobacco products is consistent with raising the
25 legal drinking age to 21, which led to reduced alcohol use and dependence among youth, and
26 contributed to a decline in drunk driving fatalities. Already six states-California, Hawaii, Maine,
27 Massachusetts, New Jersey, and Oregon as well as New York City, Chicago and over 340 other
28 communities nationwide have led the way to increase the age of sale from 18 to 21.

29 (b) Intent--The Legislature hereby declares it to be the policy and intent of this state to
30 discourage and ban the use of tobacco products by minors. As basis for this policy, the Legislature
31 hereby finds and accepts the medical evidence that smoking tobacco may cause lung cancer,
32 heart disease, emphysema and other serious health problems while the use of smokeless tobacco
33 may cause gum disease and oral cancer. It is the further intent of the Legislature to reduce
34 tobacco use by keeping tobacco products out of the hands of youth and young adults in banning
35 ~~the use of tobacco products by minors~~ the sale of tobacco products to persons under the age of
36 21 to ease the personal tragedy and eradicate the severe economic loss associated with the use
37 of tobacco and to provide the state with a citizenry free from the use of tobacco.

~~§16-9A-2. Definitions; sale or gift of cigarette, cigarette paper, pipe, cigar, snuff, chewing tobacco, pipe tobacco, roll your own tobacco, tobacco products, and tobacco derived and alternative nicotine product or vapor products to persons under eighteen penalties for first and subsequent offense; consideration of prohibited act as grounds for dismissal; impact on eligibility for unemployment benefits.~~

1 (a) For purposes of this article, the term:

2 (1) "Tobacco product" ~~and "tobacco-derived product"~~ means any product, containing,

made or derived from tobacco, or containing nicotine derived from tobacco, that is intended for human consumption, whether smoked, heated, breathed, chewed, absorbed, dissolved, inhaled, ~~vaporized, snorted, sniffed~~ or ingested by any other means, including but not limited to cigarettes, cigars, ~~cigarillos, little cigars,~~ pipe tobacco, snuff, snus, chewing tobacco, electronic smoking device, or other common tobacco-containing products. ~~A “tobacco-derived product” includes electronic cigarettes or similar devices, alternative nicotine products and vapor products.~~ “Tobacco product” ~~or “tobacco-derived product”~~ does not include any product that is regulated by the United States Food and Drug Administration under Chapter V of the Food, Drug and Cosmetic Act.

~~(2) “Alternative nicotine product” means any non-combustible product containing nicotine that is intended for human consumption, whether chewed, absorbed, dissolved or ingested by any other means. “Alternative nicotine product” does not include any tobacco product, vapor product or product regulated as a drug or device by the United States Food and Drug Administration under Chapter V of the Food, Drug and Cosmetic Act.~~

~~(3) “Vapor product” means any noncombustible product containing nicotine that employs a heating element, power source, electronic circuit or other electronic, chemical or mechanical means, regardless of shape and size, that can be used to produce vapor from nicotine in a solution or other form. “Vapor product” includes any electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe or similar product or device, and any vapor cartridge or other container of nicotine in a solution or other form that is intended to be used with or in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe or similar product or device. “Vapor product” does not include any product that is regulated by the United States Food and Drug Administration under Chapter V of the Food, Drug and Cosmetic Act.~~

(2) “Electronic Smoking device” means any device that can be used to deliver nicotine or other substance to the person inhaling from the device, including but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah. Electronic smoking device includes any component, part,

or accessory of such a device, whether or not sold separately. Electronic smoking device does not include drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

(b) No person, firm, corporation or business entity may sell, give or furnish, or cause to be sold, given or furnished, to any person under the age of ~~18~~ 21 years:

(1) Any pipe, cigarette paper or any other paper prepared, manufactured or made for the purpose of smoking any tobacco or tobacco product;

(2) Any cigar, cigarette, snuff, chewing tobacco or tobacco product, in any form; or

(3) Any tobacco-derived product, alternative nicotine product or vapor product.

(c) Any individual, firm or corporation that violates ~~any of the provisions of subsection (b) or (c) of this section and any individual who violates any of the provisions of subsection (b) of this section~~ is guilty of a misdemeanor and, upon conviction thereof, shall be fined ~~\$50~~ \$300 for the first offense. Upon any subsequent violation at the same location or operating unit, the firm, corporation or individual shall be fined as follows: At least ~~\$250~~ \$600 but not more than ~~\$500~~ for the second offense, if it occurs within two years of the first conviction; at least ~~\$500~~ \$1000 but not more than ~~\$750~~ for the third offense, if it occurs within two years of the first conviction; and at least \$1,000 but not more than \$5,000 for any subsequent offenses, if the subsequent offense occurs within five years of the first conviction. In addition to any other penalty, a licensee as required in §11-12-4a, who violates any provision of this section will be subject to license suspension, revocation and non-renewal.

~~(d) Any individual who knowingly and intentionally sells, gives or furnishes or causes to be sold, given or furnished to any person under the age of eighteen years any cigar, cigarette, snuff, chewing tobacco, tobacco product or tobacco-derived product, in any form, is guilty of a misdemeanor and, upon conviction thereof, for the first offense shall be fined not more than \$100; upon conviction thereof for a second or subsequent offense, is guilty of a misdemeanor and shall be fined not less than \$100 nor more than \$500~~

55 ~~(e)~~ (d) Any employer who discovers that his or her employee has sold or furnished tobacco
56 products or tobacco-derived products to minors to persons under the age of 21 may dismiss such
57 that employee for cause. Any such discharge shall be considered as "gross misconduct" for the
58 purposes of determining the discharged employee's eligibility for unemployment benefits in
59 accordance with the provisions of §21A-6-3 of this code, if the employer has provided the
60 employee with prior written notice in the workplace that such act or acts may result in their
61 termination from employment.

**~~§16-9A-3. Use or possession of tobacco or tobacco products, alternative nicotine products
or vapor products by persons under the age of 18 years; penalties.~~**

1 ~~A person under the age of 18 years shall not have on or about his or her person or~~
2 ~~premises or use any cigarette, or cigarette paper, or any other paper prepared, manufactured or~~
3 ~~made for the purpose of smoking any tobacco products, in any form; any pipe, snuff, chewing~~
4 ~~tobacco, tobacco product, or tobacco-derived product: *Provided*, That minors participating in the~~
5 ~~inspection of locations where tobacco products or tobacco-derived products are sold or distributed~~
6 ~~pursuant to §16-9A-7 of this code is not considered to violate the provisions of this section. Any~~
7 ~~person violating the provisions of this section shall for the first violation be fined \$50 and be~~
8 ~~required to serve eight hours of community service; for a second violation, the person shall be~~
9 ~~fined \$100 and be required to serve 16 hours of community service; and for a third and each~~
10 ~~subsequent violation, the person shall be fined \$200 and be required to serve 24 hours of~~
11 ~~community service. Notwithstanding the provisions of §49-4-701 of this code, the magistrate court~~
12 ~~has concurrent jurisdiction.~~

**§16-9A-7. Enforcement of youth smoking laws and youth nicotine restrictions; inspection
of retail outlets where tobacco, tobacco products, vapor products or alternative
nicotine products are sold; use of minors in inspections; annual reports; penalties;
defenses.**

1 (a) The Commissioner of the West Virginia Alcohol Beverage Control Administration, the

2 Superintendent of the West Virginia State Police, the sheriffs of the counties of this state and the
3 chiefs of police of municipalities of this state, may periodically conduct unannounced inspections
4 at locations where tobacco products or tobacco-derived products, are sold or distributed to ensure
5 compliance with the provisions of §16-9A-2 and §16-9A-3 of this code and in such manner as to
6 conform with applicable federal and state laws, rules and regulations. Persons under the age of
7 ~~eighteen~~ 21 years may be enlisted by such commissioner, superintendent, sheriffs or chiefs of
8 police or employees or agents thereof to test compliance with these sections: *Provided*, That the
9 ~~minors~~ persons under the age of 21 may be used to test compliance only if the testing is
10 conducted under the direct supervision of the commissioner, superintendent, sheriffs or chiefs of
11 police or employees or agents thereof and written consent of the parent or guardian of ~~such~~ that
12 person is first obtained and ~~such minors~~ those persons under the age of 21 ~~shall~~ are not be in
13 violation of §16-9A-3 of this code ~~article and chapter~~ when acting under the direct supervision of
14 the commissioner, superintendent, sheriffs or chiefs of police or employees or agents thereof and
15 with the written consent of the parent or guardian. It is unlawful for any person to use persons
16 under the age of ~~eighteen~~ 21 years to test compliance in any manner not set forth herein and the
17 person so using a minor is guilty of a misdemeanor and, upon conviction thereof, shall be fined
18 the same amounts as set forth in §16-9A-2 of this code.

19 (b) A person charged with a violation of §16-9A-2 and §16-9A-3 of this code as the result
20 of an inspection under subsection (a) of this section has a complete defense if, at the time the
21 cigarette, other tobacco product or tobacco-derived product, or cigarette wrapper, was sold,
22 delivered, bartered, furnished or given:

23 (1) The buyer or recipient falsely evidenced that he or she was ~~eighteen~~ 21 years of age
24 or older;

25 (2) ~~The appearance of the buyer or recipient was such that a prudent person would believe~~
26 ~~the buyer or recipient to be eighteen years of age or older; and~~

27 (3) ~~Such person carefully checked a driver's license or an identification card issued by this~~

~~state or another state of the United States, a passport or a United States armed services identification card presented by the buyer or recipient and acted in good faith and in reliance upon the representation and appearance of the buyer or recipient in the belief that the buyer or recipient was eighteen years of age or older.~~

(c) Any fine collected after a conviction of violating section two of this article shall be paid to the clerk of the court in which the conviction was obtained: *Provided*, That the clerk of the court upon receiving the fine shall promptly notify the Commissioner of the West Virginia Alcohol Beverage Control Administration of the conviction and the collection of the fine: *Provided, however*, That any community service penalty imposed after a conviction of violating §16-9A-3 of this code shall be recorded by the clerk of the court in which the conviction was obtained: *Provided further*, That the clerk of the court upon being advised that community service obligations have been fulfilled shall promptly notify the Commissioner of the West Virginia Alcohol Beverage Control Administration of the conviction and the satisfaction of imposed community service penalty.

(d) The Commissioner of the West Virginia Alcohol Beverage Control Administration or his or her designee shall prepare and submit to the Governor on the last day of September of each year a report of the enforcement and compliance activities undertaken pursuant to this section and the results of the same, with a copy to the Secretary of the West Virginia Department of Health and Human Resources. The report shall be in the form and substance that the Governor shall submit to the applicable state and federal programs.

§16-9A-8. Selling of tobacco products, ~~tobacco-derived products, alternative nicotine products or vapor products~~ in vending machines prohibited except in certain places.

No person or business entity may offer for sale any cigarette, tobacco product or tobacco-derived product, in a vending machine. Any person or business entity which violates the provisions of this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined

4 ~~\$250~~ \$1,000: *Provided*, That an establishment is exempt from this prohibition if individuals under
5 the age of ~~eighteen~~ 21 years are not permitted to be in the establishment or if the establishment
6 is licensed by the alcohol beverage control commissioner as a Class A licensee. The alcohol
7 beverage control commissioner shall promulgate rules pursuant to §29A-3-1 *et seq.* of this code
8 to establish standards for the location and control of the vending machines in Class A licensed
9 establishments for the purpose of restricting access by ~~minors~~ persons under the age of 21.

NOTE: The purpose of this bill is to raise the legal age for the sell or other furnishing of tobacco products from 18 years of age to 21 years of age.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.